No. 786 38

In the Supreme Court of the United States

OCTOBER TERM 1945

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION, AND INTERNATIONAL LADIES GARMENT WORKERS' UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Eighth Circuit entered on October 29, 1945 (XIII 71),[1] setting aside and refusing to enforce an order issued by the Board against Donnelly Garment Company.

[1] The volume of the printed record which contains the pleadings, the Board's decisions and orders, and the petition to review and answers is referred to as "A," and the other volumes of the printed record are referred to by the Roman and Arabic numbers indicating the volume and the page thereof.

OPINIONS BELOW

The opinions of the circuit court of appeals (XIII 7–64) are reported in 151 F. (2d) 854. Prior opinions of the circuit court of appeals in this case are reported in 7 L. R. R. Man. 560 and in 123 F. (2d) 215. The findings of fact, conclusions of law, and order of the National Labor Relations Board (A 618–622, X 3837–3898) are reported in 50 N. L. R. B. 241. A prior decision of the National Labor Relations Board in this case (A 552–617) is reported in 21 N. L. R. B. 164.

JURISDICTION

The decree of the circuit court of appeals was entered on October 29, 1945. (XIII 71). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. (a) Where an employer expresses opposition to a nationally affiliated labor organization and through his supervisory staff sets up and thereafter takes a leading part in the administration of a plant union for the declared purpose of preventing the nationally affiliated labor organization from organizing his employees, and grants the plant union a closed-shop agreement and financial and other support, must the Board consider testimony of employees that they freely

formed and joined such plant union and knew of no interference with, domination or support of it by the employer, when deciding the question whether the employer has, in fact, interfered with, dominated and supported the plant union in violation of Section 8 (2) of the National Labor Relations Act.

(b) Is the trial examiner who presides at a hearing on remand for the purpose of receiving such employee testimony biased and incapable of giving such testimony proper consideration merely because at the first hearing he expressed his opinion that such testimony was immaterial?

2. Whether the Board denied the employer and plant union due process of law in excluding the following evidence as immaterial to the issue of employer domination and support of a labor organization:

(a) Evidence as to whether contracts made by a nationally affiliated labor organization with other employers contain provisions as beneficial to employees as the provisions contained in a contract made by the employer with an alleged company-dominated labor organization;

(b) Evidence that employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of the alleged company-dominated labor organization were eligible for membership in nationally affiliated labor organizations.

3. Whether the Board denied the employer and plant union due process of law in excluding evidence of misconduct of a nationally affiliated labor organization occurring at plants other than the employer's as immaterial to a determination by the Board of whether the employer has engaged in unfair labor practices and to a consideration of whether the Board should prosecute its complaint on charges filed by such nationally affiliated labor organization.

4. Whether the employer and plant union were denied due process of law by the Board's refusal to receive at a hearing on remand the following evidence which was not offered at the first hearing and was not alleged to be newly discovered or unavailable at the first hearing:

(a) Evidence regarding the eligibility to membership in a nationally affiliated labor organization of employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of an alleged company-dominated labor organization;

(b) Evidence of the non-discriminatory character of the discharges and lay-offs of certain employees prior to the passage of the Act, where all evidence on such subject offered by the employer at the original hearing was received and the Board made no finding as to whether the discharges and lay-offs were, in fact, discriminatory.

Another question, which was passed upon by the concurring and dissenting judges below and which we think should be decided by this Court if it grants certiorari, is:

5. Is there substantial evidence in the record to support the Board's findings that the employer engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (3) of the Act, and is the Board's order proper?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 52–54.

STATEMENT

PROCEEDINGS CULMINATING IN THE CIRCUIT COURT OF APPEALS' DECISION AND REMAND ORDER OF NOVEMBER 6, 1941

This case was originally before the circuit court of appeals in 1940 and 1941 upon the petitions of Donnelly Garment Company, herein called the Company, and Donnelly Garment Workers' Union, herein called the D. G. W. U., to review and set aside and upon the request of the Board to enforce an order of the Board dated March 6, 1940 (A 552–617). At the hearing in that case, the trial examiner (1) had refused to permit the Company and the D. G. W. U. to call to the witness stand 1,200 employees of the Company whom the Company alleged would each testify that he had joined the D. G. W. U. of his own free will,

that the employees had voluntarily formed the D. G. W. U., and that such union was at all times free from employer influence, domination and support, although the trial examiner did receive such testimony from 9 employees and admitted excerpts from the record in another case containing such testimony from 12 other witnesses (I 193–194, 214–215, II 609, 612–626, 651–653, 655, 660–661, 664, 669, 704, 704a, 704p–707, 718a–718c, 718r, 718s, IV 1223, 1226, 1228–1229, 1234, 1336v, 1336ee, 1336ii, 1336pp, 1336ccc, 1336ooo, 1336xxx, 1336cccc, VI 1752–1753); and (2) had also excluded evidence that the International Ladies Garment Workers' Union, herein called the I. L. G. W. U., before and at the time of the formation of the D. G. W. U. had conspired to force the Company to sign a closed-shop contract with it by threatening and later carrying out a secondary boycott against the Company and by threatening to call a strike and to engage in conduct at the Company's plant in Kansas City similar to that engaged in by it at other garment factories in Kansas City where pickets forcibly prevented employees from going to work (II 626–627, 660–661, 705, III 758, VI 1752–1753). The trial examiner also excluded evidence relating to labor agreements made by the I. L. G. W. U. with other employers (discussed *infra*, pp. 25–26), and other evidence not material to the issues here presented. The Board in that

case upheld the trial examiner in excluding all such evidence and in rejecting offers of proof which were made as to some of it (A 560–561).[2]

On November 6, 1941, the court below handed down its decision in that case, denying enforcement of the Board's order and remanding the case to the Board for further proceedings (123 F. (2d) 215). The court below ruled (123 F. (2d) at 222–225) that the statements and rulings of the trial examiner, although in some respects

[2] During the pendency of the petitions for review, the Company and the D. G. W. U. filed with the court below applications for leave to adduce (1) evidence to show that they had been denied due process because of bias and prejudice on the part of the Board and its subordinates and collusion by them with the I. L. G. W. U., and (2) evidence going to the merits of the case, which had been excluded by the trial examiner and which they contended was competent and material. On November 7, 1940, after oral argument on the applications, the court below handed down its opinion (7 L. R. R. Man. 560), one judge dissenting, holding that the showing made by the Company and the D. G. W. U. as to the alleged bias and collusion was insufficient to invoke any action of the court, and denying the applications in that regard. It also denied the applications to adduce the excluded evidence allegedly going to the merits of the case but did so without prejudice to a renewal of such applications when the case should be finally submitted to the court (see 123 F. (2d) 215, 219–220). On May 21, 1941, oral argument was had on all issues except that which had been decided in the court's opinion of November 7, 1940. Thereafter, pursuant to a letter from Presiding Judge Archibald K. Gardner, dated July 24, 1941, requesting additional briefs on the bias and collusion question decided by the court on November 7, 1940, the parties filed additional briefs and reargued said question before the court on September 6, 1941.

erroneous, did not establish that he was biased, that the trial examiner and the Board had properly confined the issues to those tendered in the complaint by refusing to try the I. L. G. W. U. for the alleged conspiracy, but had denied the Company and the D. G. W. U. due process by excluding the evidence of employees, in accordance with an offer of proof, that they formed and joined the D. G. W. U. of their own free will and did not know of any interference with, domination or support of the D. G. W. U. by the Company. The court required the Board to vacate its findings, conclusions and order and to accord the Company and the D. G. W. U. "an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order" (*ibid.* at 225).

BOARD PROCEEDINGS AND FINDINGS SUBSEQUENT TO THE REMAND ORDER

Pursuant to the court's mandate, the Board vacated its findings, conclusions and order of March 6, 1940, and directed a further hearing for the purpose of taking additional evidence in accordance with the opinion of the court below (X 3785–3786). The same trial examiner who presided at the previous hearing again presided

(I 1, VII 2057).[3] He received the testimony of 11 of the 1,200 employees named in the offer of proof that they had voluntarily formed the D. G. W. U., that they had joined it of their own free will, and that they knew of no interference with, domination or support of such union by the Company (VIII 2588, 2599–2600, 2631–2632, 2722–2723, 2772, 2858–2859, 2914–2915, IX 3006, 3049–3050, 3078, 3123, 3218). The trial examiner then ruled that further evidence of the same nature would be cumulative (X 3250–3251, 3253–3255, 3272–3273). The Board thereupon called several of the 1,200 employees, who testified contrary to the offer of proof (III 746, 750, 751, 753, IX 3274, 3282, 3426–3434, 3467, 3469, 3471, 3474, X 3497–3498, 3528, 3550–3554, 3558–3559, 3618, 3661, 3665–3670, 3691–3693). Thereafter the trial examiner issued his intermediate report in which he found "upon the entire record" that the Company had engaged in unfair labor practices in violation of Section 8 (1), (2), and (3) of the Act and recommended that the Company cease and desist from such unfair labor practices and take certain affirmative action which he found would effectuate the policies of the Act (X 3837–3898).

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[3] The Board overruled the Company's application for designation of another trial examiner, pointing out that all the grounds urged by the Company as showing bias and prejudice had been presented to the circuit court of appeals, which ruled them insufficient to establish disqualification (A 498–501).

On June 9, 1943, the Board issued its decision and order sustaining the rulings of the trial examiner in regard to the admission and rejection of evidence and approving and adopting, with exceptions not here material, his findings, conclusions, and recommendations (A 618-622). In regard to the evidence received pursuant to offers of proof at the first hearing, the Board stated that it had carefully considered all such evidence but "that the testimony in question does not overcome more positive evidence in the record that the [Company] committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected the organization to the [Company's] domination and which removed from the employees' selection of the D. G. W. U. the complete freedom of choice which the Act contemplates." The Board added: "Since we find the evidence here adduced totally unpersuasive that the employees voluntarily designated the D. G. W. U., we are moreover impelled to adhere to the opinion, derived from our experience in administration of the Act, that conclusionary evidence of this nature is immaterial to issues such as those presented in this case." (A 619.) The pertinent facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

[1] In the following statement the references preceding the semicolon are to the pages of the record where the findings in

Beginning with the first attempt of the I. L. G. W. U. in 1934 to organize the Company's employees and continuously thereafter the Company engaged in a course of conduct designed to prevent its employees from joining that labor organization. The Company's production manager, personnel manager, and other supervisory employees attended meetings of the I. L. G. W. U. in a group and thereafter questioned individual employees about their interest in the I. L. G. W. U., disparaged it, and warned them against joining that organization, even threatening discharge of employees who joined (X 3859–3860; I 44, III 1033–1036, 1044, 1052–1055, 1058, 1063, 1066–1070, 1073–1074, 1076, 1079–1090, 1100–1108, IV 1113, 1120g, 1141, 1150–1151, 1323, 1325–1326, 1329–1331. A substantial number of the employees who joined the I. L. G. W. U. were laid off or discharged shortly after joining (X 3860–3861; III 1036–1044, 1046–1055, IV 1141, 1153, 1155–1156, 1316–1317). All of the other employees who were known to have joined the I. L. G. W. U. were transferred from the main factory to a temporary branch and thereafter laid off prior to June 1935 (X 3861; III 1062–1066, 1073–1077, IV 1120uu–1120vv, 1126v–1129, 1130d–1130e, 1132, 1135–1136, 1156b–1157, 1324–1325, 1327, 1333–

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the intermediate report which was adopted by the Board appear; references following the semicolon are to the pages of the record where the supporting evidence appears.

1334). The Board expressly refused to make any finding as to whether the discharges and lay-offs were discriminatory (X 3860, n. 23). However, it did find, on the testimony of some of the employees, that as a result of the sequence of events above-related, employees became afraid to join, admit their membership in, or discuss the I. L. G. W. U. (X 3861; III 1044–1046, 1047–1048, 1080–1081, 1141–1142).

In the early part of 1935, two of the Company's supervisory employees formed an organization called the Loyalty League, whose purpose was to promote loyalty to the Company and to oppose the I. L. G. W. U. (X 3861–3862; I 181, 304–305, III 732–733, 798d–798e, 1078, V 1620, IX 3030–3032, 3233, 3336, 3439, X 3572, 3644–3645, 3650). All employees, both supervisory and non-supervisory, except members of the I. L. G. W. U., were admitted to membership and became members (X 3860–3863; I 308, II 407, 429, 431, 533, 551, III 798e, 1071, 1078–1079, 1091, 1097, 1108, IV 1113, 1117). After the Act became effective, supervisory employees continued to solicit new employees to join the Loyalty League (X 3864; VIII 2607–2608).

Following a newspaper announcement in February 1937 that the I. L. G. W. U. was planning a second campaign, the Company secured from all but three of its employees a written pledge not to join any labor organization (X 3866; I 354–354a,

II 377–378, V 1354–1356, 1623, 1649, VII 2432–2433, IX 3335, X 3642–3644). The pledge was handed from operator to operator while they were at work (X 3864–3865; I 311–312, 354–354a, 354p–355, III 1019, IV 1294–1300, VIII 2578, 2609–2615, 2637–2638, 2725, X 3665). One of the three girls who went through the plant circulating the pledge did so at the direction of the office manager who in turn had been told by Mrs. Reed, the Company's president, that she wanted all employees to sign it (X 3865–3866; II 513–514, X 3640–3644, 3657–3658, IV 1299–1300).

On March 18, 1937, Mrs. Reed made a talk at a meeting sponsored by the Loyalty League and held during working hours (X 3867–3868; I 44d–46, 48–49, 147, 308–310, 334w, 345, 354b, II 534, V 1621, IX 3328–3329, 3438, 3457–3458, X 3575, 3666), in which she expressed her pleasure at having received the pledge not to join any labor organization, spoke of threats of violence that the I. L. G. W. U. was alleged to have made against the employees of the Company and promised to protect the employees from such violence (X 3867–3868; I 48–49, 147–148, 310, 354b–354c, II 588, III 1029–1030, VIII 2620, X 3575–3576, 3666). Her remarks made it plain that the Company's attitude toward unionization had not changed and that membership of any of the employees in the I. L. G. W. U. was not to be tolerated (X 3869; I 310, 354c, III 1029, V 1362a, IX 3332, 3413, 3438, 3459, X 3666).

On April 23, 1937, the day following an announcement in a local newspaper that employee Hull had been named as a delegate to a convention of the I. L. G. W. U., employees, in the presence of and with the acquiescence of supervisors, carried on a demonstration against Hull as she attempted to work and informed the Company's employment manager that they would not work while Hull remained (X 3869–3870; II 535–537, 541–524d, III 1015, IV 1339–1344, V 1346–1350, IX 3012–3015, 3436–3437, 3479–3480, X 3517). The employment manager, instead of maintaining discipline and insisting upon the demonstrators returning to their work, sent Hull home (X 3870; II 535–536, V 1343, 1356–1357, X 3517, 3573). Under similar circumstances and on the same day the Company sent home another employee, Sigler, who had appeared at work wearing an I. L. G. W. U. pin (X 3870–3871; I 70–72, 315–325, II 444–445, 497–499, 537–538, III 801–807, X 3666–3667). The Company thus approved and encouraged the demonstrations and took advantage of them to show its hostility to the I. L. G. W. U. (X 3871).

Shortly after the March 18 meeting at which Mrs. Reed addressed the employees, two representatives of management, Todd and Atherton, both of whom were officers of the Loyalty League, and another employee, Ormsby, hired an attorney to advise the employees in opposing the I. L. G. W. U. (X 3872; I 38–39, 176, II 555–556,

558–559, Tr. 318). Upon the attorney's advice that the best way to combat the I. L. G. W. U. was to form a plant union, Todd called a meeting of the employees during working hours on April 27 for that purpose (X 3872; I 328c–328d, II 558–559, V 1365–1366, IX 3312–3314, 3430, 3470–3471, 3457–3458, X 3530, 3541, 3620, 3667).

The organizational meeting of the plant union was planned and organized by, and was under the complete control of, the Company's representatives (X 3875). Employees were notified by their instructors, whom the Board found to be supervisors (see *infra*, pp. 20–21), to attend—the instructors having in turn been notified by the Company's telephone operator, or by Mrs. Wherry, factory manager—and the meeting was attended by supervisory employees accompanied by the non-supervisory employees under them (X 3872; I 328c–328d, 354c–354d, II 378ee, 704g, V 1364e, 1374d, VIII 2692, 2911–2913, 2995, IX 3276, 3309–3312, 3315–3316, 3397–3399, 3430–3434, 3457, 3467, 3479, X 3551, 3619–3621, 3667). After listening to speeches by Todd and the attorney, who had been invited to address the meeting, the employees, without any discussion, voted unanimously to form the D. G. W. U. (X 3873–3874; III 822–826). Before the meeting adjourned, about 1300 charter membership cards previously prepared were distributed, signed, and collected; by-laws previously prepared were adopted without alteration; and a

general chairman, Todd, and 8 group chairmen were nominated by a committee appointed by Todd and were unanimously elected to serve as officers and representatives (X 3874–3875; I 80b–80c, 176–177, 328h–330, III 826–830, X 3553, 3667). The purpose of the organization, as stated in its by-laws, was, *inter alia,* "the protection of employees and members of this Union from coercion, intimidation, violence or threats of violence in order to force them to join unions organized and dominated by outsiders not employees in this plant" (X 3874; III 798f).

Through the membership and activities of supervisory employees in the D. G. W. U., the Company continued its control and direction of the D. G. W. U. (X 3878). In addition to Todd, the general chairman, other employees, including instructors and thread girls, whom the Board found to be representatives of management (see *infra,* pp. 20–21), regularly attended, notified employees under them to attend, and took an active part in subsequent meetings of the D. G. W. U. (X 3875–3877; I 99, 131, 136, II 421, 424–424b, 428–429, 510, 715–716, 718d–718e, III 743–755, 830, 854, 865–866, 868–870, 875–882, 887, 891–894, 897–900, 909–911, 1003–1005, 1007, 1011, 1032, 1091, V 1349–1350, VII 2175, 2255–2257, VIII 2961–2962, 2671–2672, 2676–2677, 2680, 2689, 2733, 2911–2912, 2914, 2949–2953, IX 3157, 3316, 3426–3427, 3435–3436, 3445–3446, 3450, X 3644, 3649–

3650, 3671, 3673, 3675). Thus, at the 1938 election of officers, five thread girls nominated or seconded the nomination of the two nominating committees, and both committees were unanimously elected (X 3876; III 875–876, 1003–1004, VIII 2680, 2689, 2733, 2911–2912, 2949). Moreover, upon the election of the nominees, which was by standing vote, Todd called upon two instructors to give their opinions as to which slate received the larger vote (X 3877; III 881–882, 1003–1005, VIII 2953). Todd was the candidate for chairman on both slates (X 3877; III 879). Although upon several occasions employees questioned the right of some of these representatives of management to be members of or to attend and participate in meetings of the D. G. W. U. and expressed the view that the presence of such persons at meetings precluded the employees from speaking freely of their complaints, Todd assured them that all employees except the executives of the Company and the head of the personnel department were properly eligible for membership and might participate in the activities of the D. G. W. U. (X 3877–3878, III 926–927, IX 3320–3324, 3411–3413, X 3554).

Since some 600 to 800 of the employees are paid on a piece-work basis, the setting of piece-work rates determines the wage rate of the majority of the employees and is concededly the most important subject of bargaining (X 3881; I 114,

II 490, V 1374f–1375, VII 2173, 2186). Todd and the group chairman appointed as the D. G. W. U.'s committee to deal with piece-work rates Todd, Nichols and Spalito (X 3881, III, 923). Nichols is the executive of the Company who has full power to set piece-work rates on behalf of the Company and Spalito is her assistant (X 3881; II 417–418, 718f, III 923, 1007, 1108–1109, V 1374f–1375, VII 2144–2148, 2158, 2234–2239, 2400). Thus, the same persons who set rates on behalf of the Company in the first instance are also representatives of the D. G. W. U. for the purpose of protesting and negotiating in regard to those rates in behalf of the D. G. W. U. and the employees (X 3881).

In a single day, May 27, 1937, a contract providing for a closed shop was presented by the D. G. W. U. to the Company, was modified at the suggestion of the Company to include, *inter alia*, a provision that no employee should serve on the bargaining committee of the D. G. W. U. unless he had been in the employ of the Company for at least a year, and was agreed upon and signed by the parties (X 3879; I 84–86, 89–90, 198, III 807–811, 918–922, VII 2095–2098, 2104–2105, 2376, 2378–2379). In June, after the I. L. G. W. U. had publicly announced its intention to obtain a minimum weekly wage of $16, Todd recommended to the group chairman, and they decided, that in order to improve upon the

I. L. G. W. U.'s accomplishments, the D. G. W. U. should demand a minimum of $16.50 for piece-work operators (X 3880; I 118, III 929). The Company granted this demand and entered into a supplemental wage agreement with the D. G. W. U. on June 22 (X 3879–3880; II 462, III 812–821, VII 2110–2112, 2379–2386). In August or September 1937, the Company granted the D. G. W. U.'s request for a checkoff of monthly dues of 25¢ and each employee thereafter signed a card prepared by the Company authorizing such checkoff (X 3880; I 224, 226–227, 233–234, 259, 262, 274a–274b, III 799, VII 2112–2113, 2387–2388). The original closed-shop agreement, the supplemental wage agreement, and the checkoff agreement continued in effect without change up to the date of the hearing before the Board (X 3880; I 126–127, 271, 277–278, III 947–948, VII 2112). By signing a closed-shop and checkoff agreement with an organization in which it controlled determination of piece rates, the Company forced its employees to become members of an impotent bargaining agency (X 3882).

The Company in various ways lent financial support to the D. G. W. U. It permitted the organizational meeting as well as 3 or 4 other membership meetings to be held during working hours (X 3882; IX 3314–3315, 3410–3411, 3414, 3434, 3449, 3450, 3458, X 3669–3670). It paid the employees for their time thus lost from work as

well as for time lost in attending committee meetings and transacting other D. G. W. U. business during working hours (X 3884; I 127–128, 166, IX 3427–3429, 3447, 3466–3467, X 3558–3559, 3603–3604, 3606–3609, 3618). It furnished Todd with a desk at which she carried on her union business and permitted her to keep union records in a file belonging to the Company (X 3884–3885; I 35–36, 133, 262–263, III 830–831, 833, 870, 941). It permitted its interdepartmental telephones and memoranda, its messenger service, its bulletin boards, its mimeographing and dittoing machines and its typewriters to be used by the D. G. W. U. (X 3883–3884, 3885; I 62–62a, 107–108, 128–129, 262; II 378ee, III 869, 900, 936, 704g, V 1364e, 1374d, VIII 2580, 2897, 2968, IX 3152–3153, 3276, 3342, 3434, 3480, X 3558, 3671). Although the Company permitted Todd to, and she did devote a substantial amount of her normal working time to transacting D. G. W. U. business, the Company continued to pay her full regular salary (X 3884; I 31–32, 127–128, 166, III 1006, 1010, 1010b, 1010c, 1010e, 1010h).

The instructors whose activities in the D. G. W. U. have been described (*supra*, pp. 15–17), serve in all respects as foremen, each being in charge of a section of 40 operators whom they supervise, assigning work among the operators and transmitting the management's directions (X 3850–3853; I 18, 312–313, II 391–392, 505–506,

III 1109, 734c, 734g, VII 2253, VIII 2957–2960, 2963–2965, IX 3104, 3325–3326, 3434, 3464, 3469, X 3482–3483). They discipline the operators under them, determine who is to be laid off during slack periods, and keep the management informed as to whether an operator is a desirable employee, her capacity for and her attitude toward work (X 3851–3852; I 302, 1058–1061, 1092–1093, 1104, IV 1120i, 1120u–1120v, 1120z–1120bb, 1120dd–1120ee, 1120mm, V 1375, VIII 2962, IX 3326–3328, 3464; X 3482–3483, 3517–3518, 3554–3556, 3673). The instructors are assisted in all aspects of their work by the thread girls who assume charge whenever the instructors are absent and who serve in all respects as assistant foremen (X 3851, 3853; I 18, III 1109, IX 3153, 3326, 3435).

Todd not only had duties of a supervisory nature but also entirely aside from her supervisory status, occupied a close and confidential position with the Company and in such position was acting for and on behalf of the Company. She was a nurse by profession and through acquaintance with Mrs. Reed as a nurse, had secured a job with the Company in 1926 (X 3855; I 14, 142a, VII 2277–2278). The president of the Company's bank knew her as "a kind of all round man" for the Company (X 3856; II 718w). She had in the past been an instructor, a thread girl, and assistant to the production engineer (X 3855–3856;

I 19–23, 30–31, II 718w, VII 2116, 2279, IX 3414). Todd apparently had no well-defined duties at the time of the formation of the D. G. W. U. and thereafter, but was assigned a desk, and, among other duties, was charged with the responsibility of keeping the different sections of the plant supplied with materials necessary to keep production going (X 3855; I 26–28, VII 2116–2117, 2166–2167, VIII 2726, 2830). These duties and others required her frequently to move throughout the plant and interview the instructors and thread girls (X 3856; I 29). Her status was such that the telephone operator readily announced over the interdepartmental telephones meetings called by Todd, and instructors readily took directions from her as to the form in which they were to turn in time slips for employees absent on D. G. W. U. business (X 3857; V 1374d, IX 3429, cf. X 3487). Moreover, when Todd, in the presence of Production Manager Baty, and Personnel Manager Hyde, purported to explain the Company's employment policy to employee Sigler who was sent home following a demonstration against her for wearing an I. L. G. W. U. pin, they acquiesced in Todd's statements and assumption of authority, thereby permitting her to appear as a representative of management in the eyes of the employees (X 3856–3857; I 80, III 801–807). The Board found that Todd, the instructors, thread girls and other supervisory employees were

acting for and on behalf of the Company in their activities in forming, joining, and participating in the administration of the D. G. W. U. (X 3878, 3886–3887).

Upon the basis of the foregoing facts, the Board concluded that the Company had dominated and interfered with the formation and administration of the D. G. W. U. and contributed support to it in violation of Section 8 (2) of the Act; had encouraged and condoned the demonstrations of April 23, 1937, against employee Hull and laid her off, and had entered into a closed-shop contract with the D. G. W. U., in violation of Section 8 (3) of the Act; and by these and other acts had violated Section 8 (1) of the Act (X 3866, 3869, 3871, 3886–3890). The Board ordered the Company to cease and desist from dominating and interfering with, or contributing support to the D. G. W. U.; from giving effect to any contract with it; from discouraging membership in the I. L. G. W. U. or any other labor organization; from dominating, controlling, and using the Loyalty League to interfere with, restrain and coerce its employees; and from in any other manner interfering with, restraining, or coercing its employees (A 621). Affirmatively, it ordered the Company to withdraw recognition from and completely to disestablish the D. G. W. U.; to reimburse its former and present employees for all dues and assess-

ments which it had deducted from their wages on behalf of the D. G. W. U.; and to post appropriate notices (A 621–622).

THE CIRCUIT COURT OF APPEALS' DECISION OF OCTOBER 29, 1945

Thereafter the Company filed its petition in the court below to review and set aside the Board's order (A 1–360). The Board answered and requested enforcement of its order (A 361–365). The D. G. W. U. and the I. L. G. W. U. were permitted to intervene and file briefs (A 368–369). On October 29, 1945, the court below handed down its opinion (one judge concurring and another dissenting) and entered its decree denying enforcement of any part of the Board's order and setting aside the entire order for want of due process because the Board had failed to consider the conclusionary testimony received pursuant to the court's remand order of November 6, 1941; because the same trial examiner who presided at the first hearing again presided at the hearing on remand; and because the Board had refused to receive at the hearing on remand certain evidence which the court deemed material (XIII 7–71).

The rejected evidence which the court below deemed material consisted of (1) evidence rejected by the trial examiner at the first hearing as well as at the hearing on remand, the exclusion of which was not mentioned in the court's

opinion of November 6, 1941; (2) evidence rejected at both hearings, the exclusion of which was approved by the court in its opinion of November 6, 1941; and (3) evidence not within the scope of the remand order by reason of the fact that all such evidence offered at the original hearing was received.

The evidence in the first category consisted of contracts made by the I. L. G. W. U. with other employers. In its answer to the complaint the Company alleged that its contract with the I. L. G. W. U. "provides for higher wages and more favorable conditions of employment than are contained in any contract which the" I. L. G. W. U. "has entered into with the other garment manufacturers in this part of the country" (A 389–390). The trial examiner refused to receive the I. L. G. W. U. contracts stating that so many factors entered into the wage rates and conditions of employment reflected in other contracts as to render any comparison useless without an investigation into all those other factors (I 201–207, 217, 238b, II 378hh–380, VI 1653–1676). The court in remanding the case to the Board made no mention of the admissibility of such contracts. When the issue arose during the hearing on the remand (VII 2507–2520), the trial examiner rejected a new offer of proof respecting the contracts (X 3789) ruling such evidence beyond the scope of the remand and also immaterial

(IX 3257) but stating that he would receive testimony of any employee that she knew of such contracts and that her dissatisfaction with their terms led her to prefer the D. G. W. U. (VII 2514–2518, VIII 2521). He did receive such testimony (VIII 2593–2594, 2929–2931, IX 3080).

The evidence included in the second category was offered in support of allegations made in the Company's answer to the Board's complaint, said answer alleging that the I. L. G. W. U. was engaged in a conspiracy to force the Company by fraud and violence to sign a closed-shop agreement with the I. L. G. W. U. (A 387–394). At the first hearing, although the Company and the D. G. W. U. had sought to introduce evidence that the I. L. G. W. U. had engaged in acts of violence at plants other than the Company's for the purpose of showing that the I. L. G. W. U. was attempting to use the Board's processes to injure the Company and for the purpose of showing the employees' reasons for forming or joining the D. G. W. U., the trial examiner ruled that the I. L. G. W. U. was not on trial and refused to receive testimony concerning violence by the I. L. G. W. U. unless the witness had personally encountered violence or had been personally threatened with violence (I [illegible] 190, 219–223, 334k–334l, 344q–344y, 366–367, II 553, 614, 627, 660–661, 700–703, 705, 718y, 718bb, 718aa, Tr. 69, 111, 114, 118, 2046–2047, 2468, 2583). The Com-

pany filed an offer of proof (II 704p, III 742d, IV 1156b–1306, V 1409–1619) which the trial examiner rejected (VI 1752). In its opinion of November 6, 1941, the court below upheld the trial examiner's refusal to "try" the I. L. G. W. U. "for alleged conspiracy" (123 F. 2d 215, 225). At the hearing on remand, the trial examiner nevertheless received all evidence offered through Mrs. Reed as to all she knew of any violence or threatened violence by the I. L. G. W. U. (VII 2077–2092, 2151–2156), as well as all evidence offered as to what the employees had seen, read, or heard regarding such violence by the I. L. G. W. U. which had occurred within a reasonable period prior to the formation of the D. G. W. U.—such evidence being considered relevant to show the employees' reasons for forming or joining the D. G. W. U. (VIII 2566–2568, 2624–2626, 2711–2713, 2768–2771, 2788, 2848–2851, 2915–2917, 3003–3006, 3046–3049, 3078–3081, 3120–3121, 3169–3171, 4101–4103, 4125–4169, 4173–4175). The reasonable period was fixed as 6 months at the suggestion of counsel for the Company (VIII 2788, 2805–2809). The trial examiner considered irrelevant and refused to receive evidence as to whether any of the alleged violence at other plants actually occurred (VII 2512–2513, VIII 2540–2542, 2554–2555). There was no offer at either of the two hearings to show any fraud or violence at the Company's plant. It is this evidence of

misconduct against other employers which the court below now rules material.

The evidence included in the third category—evidence which was either not offered or which was offered and received at the first hearing—related (1) to whether employees at other plants having duties similar to those of the supervisory employees who were active in the formation and administration of the D. G. W. U. were eligible to membership in the I. L. G. W. U.; and (2) to whether certain union members discharged or laid off prior to the passage of the Act were discriminatorily discharged or laid off. No evidence was offered at the first hearing regarding the eligibility of any employees to membership in the I. L. G. W. U. At the hearing on remand the trial examiner at first permitted counsel for the Company to call to the stand and question an official of the I. L. G. W. U. respecting the eligibility of instructors to membership in that union (VII 2507, VIII 2523). When she testified that they were ineligible and counsel for the Company indicated that he intended to prove that they were eligible by proving numerous instances of their admission (VIII 2523, 2537–2539), the trial examiner struck all testimony he had received and refused to receive further such evidence for the reason that it was not within the scope of the remand order and for the additional reason that it was immaterial to any issue in the case (VII 2508–2510;

VIII 2559, 2564, 2788, IX 3257, X 3787–3794). With respect to the discharges and layoffs prior to the Act, during the first hearing excerpts from the transcript of a hearing before the National Industrial Recovery Board which tried charges that the Company had discriminatorily discharged or laid off certain employees and also excerpts from the transcript of a hearing in an injunction suit before Federal District Judge Miller (*infra*, pp. [redacted]5; 44) were introduced in evidence pursuant to a stipulation of the parties, and all other evidence offered by the Company to show that the discharges and lay-offs were nondiscriminatory was received (I 44a, 273, II 389–390c, 394–395, 399–401, 539, 550a, 707, III 728–729, 740, 1032–1110a, IV 1112cc–1112dd, 1120n, 1120o–1120w, 1120z, 1120aa–1120ee, 1316–1318, Tr. 1891, 1964, 1967–1968, 1978, 2815). This matter, not being within the scope of the remand order, the trial examiner, during the hearing on remand, refused to receive any further testimony on that matter (VIII 2639, X 3783, 3792–3793), except the testimony of Mrs. Reed, the Company's president, who by reason of illness had been unable to testify at the first hearing (VII 2064–2065, 2069–2074, 2148–2151). There was no claim that any of the other evidence offered was newly discovered or otherwise unavailable at the first hearing. In its decision, the Board expressly stated that it made no finding whether the discharges and lay-offs were, in fact, discriminatory (X 3860, n. 25).

The court below suggested in its opinion that the Board apply to this Court for a writ of certiorari to review the due process questions involved (XIII 51).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. (a) In holding that the Board in dealing with the question of company domination of the D. G. W. U. failed to consider testimony of the Company's employees that they freely formed and joined the D. G. W. U. and knew of no interference with, domination or support of that union by the Company.

(b) In holding that the Board was required to consider such evidence.

(c) In holding that the trial examiner who presided at the hearing on remand was biased and incapable of giving such testimony proper consideration because he had expressed his opinion at the first hearing that such testimony was immaterial.

2. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive in evidence labor agreements made by the I. L. G. W. U. with other employers.

3. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence as to whether or not the I. L. G. W. U. admitted to membership employees at other plants having duties similar to

those of the Company's employees whom the Board found to be supervisory.

4. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence that the I. L. G. W. U. at and prior to the time of the formation of the D. G. W. U. had used fraud and violence at the plants of other employers to compel their employees to join the I. L. G. W. U.

5. In holding that the Board had denied due process to the Company and the D. G. W. U. by refusing to receive evidence as to whether the Company, prior to the passage of the Act, had discriminatorily discharged or laid off certain members of the I. L. G. W. U.

6. In setting aside and refusing to enforce the Board's order.

7. If the Board improperly failed to consider any evidence, in failing to remand to the Board such portions of the case as were affected by such failure of the Board.

REASONS FOR GRANTING THE WRIT

The statement of facts, which, for reasons of clarity, we have set forth in greater detail than is customary in a petition for certiorari, shows that in 1935 and thereafter the Company flagrantly violated the National Labor Relations Act in a number of respects. The court below has twice set aside the Board's finding to this effect on procedural and evidentiary grounds which we

believe are utterly without substance, and which, as we shall show, conflict with decisions in other circuits. After more than seven years of litigation before the Board and in the courts,[5] we think that the miscarriage of justice which has thus far enabled the Company to disregard the Act with impunity is sufficient to call for the exercise of this Court's supervisory powers. Indeed the court below itself recognized the importance of the issues presented and their appropriateness for review by this Court on certiorari, for it stated, "In order to resolve this controversy over the question of due process, we think that the Board would be entirely justified in applying for certiorari. With that thought in mind, we have

[5] The original charge in this case was filed on August 9, 1938 (A 391, 553). The complaint was issued upon amended charges filed on April 6, 1939 (A 375–376) and the original hearing was held between June 5 and July 15, 1939 (X 3838). The typewritten transcript of testimony taken at that hearing covered over 3100 pages (Tr. 1–3116) and the exhibits another 2600 pages (fol. 4361–5990) including more than 750 typewritten pages of excerpts from the transcripts of hearings held in 1935 before the National Industrial Recovery Board and of hearings held in 1939 before a federal district court (fol. 5114–5895) in the injunction suit (*supra*, p. 29). The Board's original decision was dated March 6, 1940 (A 552–617). The hearing on remand pursuant to the circuit court of appeals' decision of November 6, 1941, was held between July 6 and September 17, 1942 (X 3846). The transcript of that hearing covered over 3800 typewritten pages of testimony (Tr. 3117–6992) and another 140 pages of exhibits (fol. 6994–7139). The total unprinted record in this case is more than 10,000 pages long.

tried to give a fairly complete statement of the issues. The questions presented are of importance to the Board in the administration of the Act. They are also of importance to the Company, to the International, to the public, and particularly to the employees whose rights are involved." (XIII 51.)

1. Despite the holding of the court below that the Board did not consider the employees' testimony as to the D. G. W. U.'s being their uninfluenced choice (XIII 40-44), this was not the case. The court must have overlooked the Board's statement that it "carefully considered all such evidence" but found that it did not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D. G. W. U. which subjected that organization to the respondent's domination and which removed from the employees' selection of the D. G. W. U. the complete freedom of choice which the Act contemplates" (A 619). The Board found, in the circumstances of this case, that such testimony was "unpersuasive that the employees voluntarily designated the D. G. W. U." It is true that the Board expressed its view, "derived from" its "experience in administration of the Act", that such evidence is immaterial to issues like those in this case. Nevertheless, the Board subsequently found that "A consideration of all the evidence"

convinced it "that the respondent dominated and interfered with the formation and administration of the D. G. W. U." (*Ibid.*) Accordingly, it is clear that the Board did consider the employees' testimony but found it not controlling.[6]

At any rate, in holding that in determining whether the Company had interfered with, dominated, and supported the D. G. W. U., the Board must consider as material conclusionary testimony of employees that they freely formed and joined that organization and knew of no interference with, domination or support of it by the Company, the court below has decided an important question in a manner which conflicts with the decision of the Court of Appeals for the District of Columbia in *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. (2d) 641, 653.[7] In that case,

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[6] The Board was certainly justified in treating such evidence as not controlling. In a situation like that at bar, where the Company has a closed shop with a plant union, there could be little chance that an employee still desiring to continue working for the Company would testify in the Company's presence that the plant union was not the union of his choice. For a detailed analysis of the Board's attitude toward this type of employee evidence, see opinion below, note 6 (XIII 41–43).

[7] The action of the Board in setting aside its former decision and order and conducting another hearing in accordance with the circuit court of appeals' remand order of November 6, 1941, rather than then applying to this Court for a writ of certiorari, does not, of course, affect the right of this Court now to grant certiorari to review any ruling made by the court below in its interlocutory decision. *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 284; *Hamil-*

the employers sought to ask representatives of plant unions charged with being company dominated a series of questions designed to elicit whether the witnesses were conscious of being influenced, restrained, interfered with, coerced, or dominated by their employers. It was stipulated by the counsel and the examiner that the witnesses would have answered in the negative. The court of appeals denied the employer and the dominated unions leave to adduce such testimony, holding that, "Since the organization, structure, and Company support of the plans ensure Company dominance and violate the Act, this testimony would have been irrelevant" (*ibid.*). The decision of the court below holding that the Board must receive and consider such evidence is directly in conflict, for the organization, structure, and company support of the D. G. W. U. in the instant case likewise insure company dominance and violation of the Act. As shown by the facts summarized *supra*, pp. 11–23, the Company, after demonstrating strong opposition to the organization of its employees by the I. L. G. W. U., formed an organization called the Loyalty League whose primary purpose was the frustration of efforts of the I. L. G. W. U. to organize its employees, and thereafter, through the Loyalty League and its supervisory employees, set up and

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ton-Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 257–258; *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82.

took a leading part in the administration of a labor organization called the D. G. W. U., participated in determining the structure of the bargaining committee, controlled the piece-work committee through membership of its supervisory employees on that committee, granted the D. G. W. U. a closed-shop contract, agreed to a checkoff of dues for that labor organization, and otherwise contributed financial and other support to it.

The holding of the court below also conflicts in principle with decisions of other circuit courts of appeals. In *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. (2d) 240, 244–245 (C. C. A. 7), certoriari denied, 320 U. S. 746, the examiner had permitted the Independent, an alleged company-dominated union, to adduce testimony of witnesses who had participated in its organization as to their reasons for joining—as was permitted in the instant case—but he rejected as cumulative the testimony of several thousand other employees as to their reasons for joining. The Independent contended that it had been denied a fair hearing, arguing that such testimony "was material and tended to prove that these employees had joined the Independent of their own free will, and to disprove interference by the company." In rejecting this argument, the court stated, *inter alia*:

> Uncontradicted testimony of a large number of employees to the effect that they

were free from coercion and under no sense of constraint cannot avail the Independent, *Bethlehem, etc.*, v. *N. L. R. B.*, 1 Cir., 114 F. (2d) 930, 937, and *American Enka Corp.* v. *N. L. R. B.*, 4 Cir., 119 F. (2d) 60, 62, and a showing of non-coercion in one instance does not disapprove an affirmative showing of coercion in another instance, *United States* v. *General Motors Corp.*, 7 Cir., 121 F. (2d) 376, 405. The recognition of constraint calls for a high degree of introspective perception, *Bethlehem Shipbuilding* case, supra, 114 F. (2d) 937, and it would be a rare case where the finders of fact could probe the precise factors of motivation underlying each employee's choice. Normally, the conclusion that the employees' choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible, and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates, *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588, 61 S. Ct. 358, 85 L. Ed. 368.

The Circuit Court of Appeals for the Fifth Circuit ruled similarly in *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870, 871, certiorari denied, 310 U. S. 651. In two other cases in which the Board has refused

to give weight to conclusionary testimony like that offered in this case, the Circuit Court of Appeals for the First and Fourth Circuits have enforced Board orders based upon findings that the employer has violated Section 8 (2) of the Act. See *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 937 (C. C. A. 1), certiorari dismissed, 312 U. S. 710; *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60, 62 (C. C. A. 4).[8]

Although in one early case, *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872, 875 (C. C. A. 3), the conclusion of the circuit court of appeals that there was not substantial evidence to support the Board's finding that the employer had violated Section 8 (2) of the Act was held to be "reenforced by a stipulation

[8] Cf. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, reversing 101 F. (2d) 841, 847 (C. C. A. 4) and *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing 116 F. (2d) 350, 355–356 (C. C. A. 7), in which this Court reversed the circuit courts of appeals, which had set aside Board orders of disestablishment on the ground that the employees desired to be represented by the labor organization which Board found to be company dominated. Cf. also *National Labor Relations Board* v. *New Era Die Co.*, 118 F. (2d) 500, 505 (C. C. A. 3) wherein the court upheld the Board in its refusal to permit the employer, who had refused to bargain with an accredited bargaining representative, to show by the testimony of his employees who had revoked their authorizations of such representative that they did so voluntarily. This testimony the court held was "properly rejected as immaterial."

of counsel that members of the Association, if called, would have testified that they joined without interference or coercion and that their preference was for the Association, and not for either of the other two unions seeking to organize the employees, in no case except the instant one has a court ever ruled that the Board denied due process to an employer by holding such testimony immaterial.

As a corollary to its ruling in this respect, the court below concluded that the trial examiner, because he had expressed his opinion at the first hearing that such testimony was immaterial, was disqualified to preside at the hearing on remand. If the Board is correct in its view that such testimony was immaterial, then the court's ruling relative to the trial examiner must fall for that reason alone. However, the court below, nevertheless, erred in holding that the trial examiner was disqualified. He had no power to decide a case but merely make recommendations to the Board which alone has power to decide. Section 10 (c) of the Act; *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586, 588–590 (C. C. A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494, 496 (C. C. A. 3); *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876, 882 (C. C. A. 3), certiorari denied, 319 U. S. 751. There would consequently be even less reason for

disqualifying him from presiding at the hearing on remand than for disqualifying a judge who has ruled erroneously upon the materiality of evidence from hearing the same case on remand. It is well settled that a judge is not disqualified from presiding at a hearing because of his previous erroneous rulings in the case. *Ex parte American Steel Barrel Co.*, 230 U. S. 35; *Berger* v. *United States*, 255 U. S. 22, 23–24. The same doctrine applies to administrative proceedings. *United States* v. *Morgan*, 313 U. S. 409, 421.

2. The decision of the court below, insofar as it ruled material to the issue of company domination of the D. G. W. U. evidence as to whether contracts made by other employers with the I. L. G. W. U. contain provisions as beneficial to employees as those in the contract made by the Company with the D. G. W. U., is in conflict with a decision of the Court of Appeals for the District of Columbia. *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 651, 653 (App. D. C.). In that case, the employer, charged with interfering with, dominating and supporting a plant union had sought to subpoena a witness for the purpose of questioning him concerning the dates, scope, duration and terms of certain agreements made between the charging union and another employer. The Court of Appeals upheld the Board's ruling (14 N. L. R. B. 539, 595, n. 36) that "these agree-

ments were irrelevant" and that neither the other employer nor the agreements were "on trial" (120 F. (2d) at 651). No facts exist in the *Bethlehem Steel* case which differentiates it from the instant case with respect to the relevancy of this type of evidence.

3. The decision of the court below is in conflict with decisions of the Circuit Court of Appeals for the Seventh Circuit insofar as it holds material to the issue of employer responsibility for conduct of supervisory employees in forming and administering the D. G. W. U., evidence that the I. L. G. W. U. admits to membership at other plants employees holding positions similar to those of the Company's supervisory employees. *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 524 (C. C. A. 7); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469, 472 (C. C. A. 7), certiorari denied, 318 U. S. 774.

In the *New Idea* case, the company contended that it should not be answerable for the conduct of its assistant foremen in dominating and supporting a plant union because, among other reasons, such assistant foremen were eligible to membership in both the plant union and in an American Federation of Labor union. The court held, however, that ineligibility to union membership was not a condition precedent to employer responsibility for the acts of supervisory employees. In the *Aintree* case, the same court in

upholding its former ruling in the *New Idea* case, relied heavily upon this Court's decision in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81, wherein this Court upheld the Board's finding that the employer was responsible for conduct of some of his minor supervisory employees in throwing their support to one nationally affiliated labor organization and opposing another even though such supervisory employees were "bona fide members" of the former.

Evidence respecting the eligibility of supervisors to membership in the charging union is clearly irrelevant in a case like the instant where instead of one or two supervisors possibly acting in their own interest there is concerted activity by the entire body of supervisors in forming and participating in the administration of the D. G. W. U. (*supra*, pp. 15–18).

Aside from the immateriality of this evidence, however, we believe that the trial examiner properly excluded it at the hearing on remand because it was not within the scope of the remand order. No attempt was made by any of the parties to introduce such evidence at the original hearing, the transcript of which is a part of the entire record, and neither the Company nor the D. G. W. U. alleged that such evidence was newly discovered or unavailable at the original hearing. The trial examiner made it clear at the hearing

on remand—and we think properly so—that with the exception of testimony of Mrs. Reed, the Company's president, who was precluded on account of illness from testifying at the first hearing, he did not intend to receive any evidence except that mentioned in the opinion of the court below as having been improperly rejected by him at the first hearing (VIII 2788). As this and other courts have recognized, "the proper administration of justice demands that there be an end to litigation. It demands that parties shall not present their causes of action or their defenses piecemeal." *Sorensen* v. *Pyrate Corp.*, 65 F. (2d) 982, 985 (C. C. A. 9); *Roberts* v. *Cooper*, 20 How. 467, 481; *United States Trust Co.* v. *New Mexico*, 183 U. S. 535, 537, 540.

4. Other evidence not included within the scope of the remand order, the exclusion of which at the hearing on remand was held by the court below to constitute a denial of due process, related to whether or not certain employees discharged or laid off by the Company prior to the passage of the Act were discriminatorily discharged or laid off.[2] As shown, *supra*, p. 29, at the first hearing, pursuant to stipulation of all the parties, excerpts from the transcript of a hearing before the National Industrial Recovery Board which

[2] In so holding, the court erroneously assumed that the Board had inferred discriminatory motives for the discharges and lay-offs (XIII 48). The Board expressly stated in its decision that it made no finding on that question (X 3860, n. 25).

tried charges that the Company had discriminatorily discharged or laid off these employees and excerpts from the transcript of the hearing in the injunction suit before Federal District Judge Miller were introduced in evidence and all other evidence offered by the Company on this subject was received. The Company raised no question in this regard either before the Board or the court below prior to the hearing on remand, and it has never alleged that any additional evidence which it may have on that subject is newly discovered or was unavailable at the first hearing. The Company should not be permitted to present its defenses piecemeal.

5. The court below in its first opinion (123 F. (2d) at 225) approved the Board's refusal to try the I. L. G. W. U. for a conspiracy to force the Company to enter into a closed shop with it. However, in its second opinion the court below held that such evidence was relevant for the Board to consider (1) in determining whether charges were filed by I. L. G. W. U. in good faith or for the purpose of influencing an injunction suit brought by the Company against the I. L. G. W. U. in a Federal District Court to prevent the I. L. G. W. U. from carrying out threats to use violence in organizing the Company's plant,[10]

[10] See *Donnelly Garment Co.* v. *International Ladies' Garment Workers' Union*, 20 F. Supp. 767 (W. D. Mo.), affirmed, 21 F. Supp. 807 (W. D. Mo.), reversed in 304 U. S. 243; 23 F. Supp. 998 (W. D. Mo.); 99 F. (2d) 309 (C. C. A. 8).

and (2) in determining the reason why employees joined the Loyalty League and the D. G. W. U. (XIII 44–48).

The reversal by the court below of its position on the materiality of this evidence is apparently due to the interpretation it put upon this Court's decision in *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, which was handed down subsequent to the first opinion in the instant case. During the progress of the hearing before the Board of the *Indiana & Michigan* case and at various times prior to the Board's decision, severe damage was done to the properties of the employer for which several prominent union leaders were subsequently indicted and convicted. Several of these leaders had been witnesses at the hearing before the Board. The employer sought to adduce additional evidence before the Board to show an unlawful conspiracy among the union leaders to intimidate and coerce the employer into settling the case

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certiorari denied, 305 U. S. 662; 119 F. (2d) 892 (C. C. A. 8); 121 F. (2d) 561 (C. C. A. 8); 47 F. Supp. 61 (W. D. Mo.); *Donnelly Garment Co.* v. *Dubinsky*, 47 F. Supp. 65 (W. D. Mo.); *Donnelly Garment Co.* v. *International Ladies' Garment Workers' Union*, 47 F. Supp. 67 (W. D. Mo.); 55 F. Supp. 572 (W. D. Mo.); *Donnelly Garment Co.* v. *Dubinsky*, 55 F. Supp. 587 (W. D. Mo.); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. (2d) 246 (C. C. A. 8), certiorari denied, 325 U. S. 852, where an injunction erroneously granted by the federal district court was subsequently set aside.

then in the process of being heard and decided, and recognizing the union as bargaining representative of his employees. The employer alleged that the unlawful destruction of his property was pursuant to the conspiracy thus to coerce and intimidate the employer in the defense of his case before the Board. This Court held that under the circumstances the unlawful conduct of the union leaders was material to a consideration of the weight and credibility of the testimony of these leaders as well as the witnesses closely associated with them. It also held that under the circumstances the Board might wish to consider whether it should permit its processes to be taken advantage of by unions or by union leaders to advance their illegal purposes.

In this case there was no offer to prove that any of the witnesses had been convicted of any unlawful conduct against the Company or any other employer and, therefore, the rejected evidence could have no bearing on the weight and credibility of any of the testimony. Moreover, since none of the alleged unlawful conduct of union leaders occurred during or immediately preceding the hearing and other proceedings before the Board, it could not have been designed to intimidate the Company in the defense of its case before the Board as was allegedly true in the *Indiana & Michigan* case. The court below appears to have felt that the excluded evidence of misconduct was admissible for the purpose of

showing that the charges filed by the I. L. G. W. U. were designed to influence the result of the action for an injunction mentioned *supra*, p. 44; but that is immaterial here where the Board was concerned only with determining whether the Company had engaged in unfair labor practices and with insuring to all parties a fair hearing on such issues. The Board issues a complaint only after its investigation shows that there is merit to the charges, and the motive of the I. L. G. W. U. in filing the charges cannot deprive the Board of jurisdiction to proceed on the charges. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 872 (C. C. A. 5), certiorari denied, 310 U. S. 651; *National Labor Relations Board* v. *Fickett-Brown Mfg. Co., Inc.*, 140 F. (2d) 883, 884 (C. C. A. 5).

It is true, as this Court pointed out in the *Indiana & Michigan* case (318 U. S. at p. 19), that the Board might in its discretion withhold or dismiss its complaint "if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process." But no offer was made to show any violence or destruction or any other kind of misconduct at the Company's plant and the Board does not feel that threats made by

a union to call a strike—even a strike accompanied by violence upon the picket lines as was allegedly true at strike-bound plants in Kansas City—should influence it in issuing a complaint upon charges filed by the union making such threats. As pointed out, *supra*, p. 27, the trial examiner admitted in evidence all testimony of Mrs. Reed and of employees as to what they had seen, read, or heard regarding violence upon the picket lines at other plants where the I. L. G. W. U. had called strikes and threats of a strike accompanied by similar violence at the Company's plant—the evidence of the employees being considered relevant to show their reasons for joining the D. G. W. U.—but considered irrelevant and refused to receive other evidence as to whether such violence actually occurred. Taking cognizance of the Company's contentions relative to the alleged threats, the Board stated in its decision "It may be true, as the [Company] contends, that many of them [the employees] feared the alleged threats of the I. L. G. W. U. but instead of permitting the employees to decide for themselves what attitudes they would adopt with regard to the I. L. G. W. U., the [Company] seized upon such fears as may have existed to build up and strengthen a militant employee opposition toward that labor organization" (X 3868–3869).

As Judge Woodrough in his dissenting opinion in this case pointed out, "the inquiry demanded

in the proposed fields of controversy would only protract and distract. It could not illuminate. Employers may not commit the unfair labor practices such as charged in this case to prevent union electioneering even by labor unions that have a bad record behind them". (XIII 63.) A determination whether the Board is required to sidetrack the functions expressly delegated to it under the Act for the purpose of inquiring into alleged unlawful conduct of the charging union in situations such as those present in this case is important to the administration of the Act. To require the Board to take such evidence would not only permit employers who have violated the Act to do so free of the sanctions of the Act whenever the organization filing the charge has been guilty of misconduct, but would greatly hamper the work of the Board by diverting its inquiries to collateral matters rather than to the merits of the unfair labor practice charges.

6. The court below did not decide whether the Board's subsidiary findings of fact, upon which the Board based its conclusions that the Company had violated Section 8 (1), (2), and (3) of the Act, are supported by substantial evidence, although the concurring and dissenting judges passed upon this question.[11] We submit that the

[11] The judge in the court below who wrote the opinion designated as the opinion of the court refused to decide whether there was substantial evidence to support the Board's

facts summarized in the Statement *supra*, pp. 11–23, amply support the Board's findings and that the Board's order is in all respects proper. We believe that the court below erred in setting aside and refusing to enforce the Board's order. This case has four times been argued before the court below over a period of more than four years (*supra*, pp. 7, n. 2, 24). Three opinions have been issued by that court but it has not yet passed upon the substantiality of the evidence supporting the Board's findings (7 L. R. R. Man. 560; 123 F. (2d) 215; XIII 7–69). If this case should be remanded to the court below, that court, in line with its past practice in this case, might again consider the case on some procedural or due process question not before this Court and might again, without passing on the question of substantiality of the evidence, refuse to enforce the Board's order. Accordingly, if this Court grants certiorari, we request that, in addition to reversing the court below on the due process issues presented, this Court enforce the Board's order *in toto*.

CONCLUSION

As the court below recognized, the questions raised by its decision are of substantial public importance. The decision in several respects conflicts with decisions of other circuit courts of ap-

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order (XIII 51). A concurring judge thought that that question should be decided in the negative, and the dissenting judge thought that the order should be enforced (XIII 55–56, 61, 64).

peals. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

DAVID A. MORSE,
General Counsel,
National Labor Relations Board.

JANUARY 1946.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

* * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, main-

tained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including

reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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